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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 185

TAFT-INGALLS CORPORATION,
Petitioner,

v.

THE ASSOCIATED PRESS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Respondent in No. 185, The Associated Press ("AP"), has also filed a petition for a writ of certiorari, No. 183, October Term, 1965, seeking review of the same judgment of the United States Court of Appeals for the Sixth Circuit which petitioner here seeks to have reviewed, to the extent that such judgment decided that AP's relationship with Taft-Ingalls Corporation (hereinafter sometimes called "Times-Star") constituted an illegal tie-in in violation of the antitrust laws, and dismissed AP's complaint.

If the petition in No. 183 is granted and the judgment below thereafter reversed by this Court, the issue raised by this petition need not be reached.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported in 340 F. 2d 753, and is appended to the petition in No. 185 as Appendix A, and to AP's petition in No. 183 as Appendix A. The opinion of the United States District Court is unreported, but is appended to AP's petition in No. 183 as Appendix B. It is also printed at pages 23a-32a of the Appendix for Defendant-Appellant (Times-Star) filed in the Court of Appeals (Volume III of the Certified Record).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

It is respectfully submitted that no question such as that presented by the petition in No. 185 is properly raised by the decision of the court below. As we show hereinafter, the only damage questions which might be said to arise, and we do not believe they are appropriate for this Court's review, are (1) whether, on the record, Times-Star has shown the fact of damage or injury, and, if so, (2) whether, on the record, Times-Star has submitted any relevant data which would permit the trier of fact to make a reasonable estimate of the extent of Times-Star's damages without relying on speculation or guesswork.

STATUTES INVOLVED

The statutes involved are referred to in the petition (p. 2).

STATEMENT

The facts underlying this litigation are set forth at pages 3-14 of AP's petition in No. 183. They plainly show, we submit, that the majority of the Court of Appeals below erred in sustaining Times-Star's antitrust tie-in defense to AP's complaint because, among other things, (a) Times-Star, when it agreed in August 1948 to take AP's basic news service, wanted exactly what it obtained, (b) Times-Star could not later change its mind and, on a plea that AP's method of operation amounted to an illegal tie-in, commit with impunity a breach of its contract with AP—a contract perfectly valid when made, and (c) AP's basic news service, though transmitted over three wires, was a single, inseparable service with respect to which an illegal tie-in could not exist.

On the question of liability on the complaint, the four judges below who heard the case split two to two. The District Court Judge (Hon. Frank J. Battisti), and Judge O'Sullivan of the Court of Appeals found that AP had not violated the antitrust laws. Judges Phillips and Edwards, of the Court of Appeals, found to the contrary. In contrast, all four judges unanimously held that Times-Star's counterclaim, seeking damages for the alleged violation, must be dismissed (Appendix A to Petition in No. 185, pp. 32a, 53a; Appendix B to Petition in No. 183, p. 69a).

Unless, of course, the majority of the Court of Appeals properly held that an illegal tie-in existed, the question of whether Times-Star sufficiently proved damages on its counterclaim does not arise. In what follows we assume, *arguendo*, that an antitrust violation occurred, although in fact, as shown by the petition in No. 183, we vigorously deny that such is the case. Our objective here is to demonstrate not only that there is no important question presented by

this petition for this Court's consideration, and no conflict between the decision below and those of this Court or other Courts of Appeals, but also that Times-Star (a) has presented no relevant data permitting a reasonable estimate of the extent of damages on any basis, and (b) has not even presented evidence showing that Times-Star was in fact injured.

ARGUMENT

Since *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 562, it has been clear that the fact of damage, or injury, arising from an antitrust violation must be proved with certainty. And, at least since *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 264, it has been apparent that while a jury, or other finder of the facts, "may not render a verdict [as to the extent of damages] based on speculation or guesswork", it "may make a just and reasonable estimate of the damages based on relevant data. . . ."

In this case, there is no doubt that the court below applied the proper standards of damage proof. The only conceivable question is whether the record supports the Court of Appeals' rulings on the issue of Times-Star's damages.

AP is a membership corporation organized to gather and distribute to, and exchange with, its members news and information of all kinds (R. 61a; P. Ex. 6, R. 395a-397a, 24b).* No applicant can be admitted to AP membership without giving his "assent to be bound by the By-Laws. . . ." (P. Ex. 6, R. 401a, 24b). Nor can he be admitted to membership unless he has entered into a contract with AP providing that AP "shall furnish and the member

*The citation "R. a" refers to pages in the Appendix for Defendant-Appellant (Petitioner) in the Court of Appeals (Volume III of the Certified Record); the citation "R. b" refers to pages in the Appendix for Plaintiff-Appellee (Respondent) in the Court of Appeals (Volume IV of the Certified Record).

shall receive and use a regular news service" of AP (R. 401a, 411a). The "nature and extent" of the news service to be furnished a member, and the assessment to be levied, is determined by AP's Board of Directors. Both may be changed from time to time by the Board (R. 410a-411a). Membership in AP "shall cease upon the expiration or termination of his or its contract to which such membership relates" (R. 403a).

AP's basic news service has consisted of national, international, business, financial, regional and local news which, since 1935, has been transmitted to metropolitan newspaper members east of Kansas City and north of the Mason-Dixon line over three so-called wires, the A and D wires, and a regional wire known in Ohio as the S or Ohio Big Cities wire (see Petition, No. 183, pp. 5-6; P. Ex. 7, R. 421a-422a, 92a; R. 81a-82a, 179a, 214a, 215a). AP's costs of operation in furnishing the basic news service have, since 1915, been financed under a formula approved by the Board of Directors for assessing each of its members on the basis of the population served by such member (R. 65a-66a, 80a, 195a, 89b, 118b; D. Ex. 35, R. 467a-468a; 324a).

Thus, under the By-laws, a newspaper, by becoming and remaining a regular member of AP, necessarily consents to at least three things: (1) it will receive the basic news service, (2) it will pay an assessment based, not on AP's cost of furnishing the service to it, but on the population of the area it serves, and (3) it will furnish to AP, for exchange with other members, all spontaneous news originating in its area (P. Ex. 6, R. 401a, 410a-411a, 24b; P. Ex. 4, R. 390a, 65a).

The majority of the Court of Appeals below, in holding that the regional or S wire was severable from the A and D wires, necessarily implies that, at least upon proper

request, AP is required to supply Times-Star, or any other Ohio metropolitan newspaper, with the S wire alone. A newspaper which would receive the S wire only, however, could not become or remain a member of AP. This is so because (a) such newspaper does not consent to receive AP's basic service, and (b) it does not agree to pay an assessment calculated on the same basis as that agreed to by the other members.

If, therefore, a newspaper such as Times-Star were to be furnished with news transmitted over the S wire alone, some basis of payment other than an assessment based upon the population of the Cincinnati area would have to be devised. Obviously, AP should be entitled to charge, as a bare minimum, its cost of furnishing to Times-Star the S wire alone.

By the same token, where, as here, AP did not comply with Times-Star's tardy request, nine years after it signed its contract, for the S wire alone, Times-Star's measure of damages, if any, would appear to be at most the difference (again, if any) between AP's cost of furnishing the single wire to Times-Star and the amount of the assessment paid by Times-Star from the time it requested the single wire to the date when it sold its assets to the competing Scripps newspaper.

Such a measure of damages would be consistent with the tie-in cases on which Times-Star itself relies in an attempt to create a conflict (Petition, p. 11). Thus, in *Lessig* v. *Tidewater Oil Company*, 9 Cir., 327 F. 2d 459, 471-2 (1964), *cert. den.*, 377 U. S. 993; *Osborn* v. *Sinclair Refining Company*, 4 Cir., 324 F. 2d 566, 570 (1963); and *Bascom Launder Corp.* v. *Telecoin Corp.*, 2 Cir., 204 F. 2d 331, 334 (1953), *cert. den.*, 345 U. S. 994, the courts either held or suggested that in illegal tie-in cases, plaintiff's damages might include the additional amounts he had to

pay because of the tied-in purchases he was compelled to make.

Times-Star apparently intended to offer some such proof. It retained Mr. R. Kirk Batzer, of the accounting firm of Lybrand, Ross Bros. & Montgomery, to make a study of the damage question (D. Ex. 54, R. 525a, 337a). It is on Batzer's reports, together with his direct examination and cross-examination, that the validity of Times-Star's damage proof depends (D. Ex. 35, R. 467a, 324a; D. Ex. 54, R. 525a, 337a; D. Ex. 55, R. 541a, 337a; R. 315a-344a, 117b-140b; Petition, No. 185, pp. 5-6).

Batzer reported that his investigation was "for the purpose of ascertaining information as to costs incurred by The Associated Press in respect of each of certain wire facilities which it furnished to The Cincinnati Times-Star. . . ." (R. 525a).* Mr. Batzer's conclusions, however, bore no relation to AP's cost of furnishing the S wire alone to Times-Star. Mr. Batzer, on cross-examination, conceded as much (R. 125b). This fundamental error in the Batzer theory renders his reports useless as a measure of damages.

Initially, Mr. Batzer endeavored to isolate the total operating costs of AP, including allocations of overhead, applicable to the basic news service (D. Ex. 54, R. 527a-531a, 337a). For purposes of argument, we will assume that this was properly done. Batzer further assumed, and we do not quarrel with the assumption, that the total assessments paid by all members receiving the basic service are designed roughly to equal, in the long run, these operating costs (R. 525a). Batzer's fundamental error was in leaping from these assumptions to the erroneous conclusion, without support in the record and on a matter as to which he was concededly not an expert (R. 130b), that the assess-

*That is to say, AP's cost of gathering and distributing news over the A wire, over the D wire, and over the S wire to a *single newspaper,* Times-Star.

ment charged to a single newspaper, Times-Star, "may also represent the appraisal by The Associated Press of its cost of furnishing such service" (D. Ex. 54, R. 526a, 337a).

Batzer, by sampling the volume of lineage coming to Times-Star over each of the three wires (A, D and S) during the period of a week, obtained percentages representing the proportion of the total lines transmitted by the basic service which went over each of the wires during the sample period. He applied these percentages to Times-Star's assessment for the basic service of $1,317.45 weekly, to obtain what he calls the "cost of the separate wire services" to Times-Star (D. Ex. 54, R. 534a, 337a; D. Ex. 55, R. 542a, 337a). Even if we assume, for the time being, that Batzer's calculations give him roughly what Times-Star had been paying under its assessment, for each of the three wires, the figures bear no relation to the only figure relevant to a proper measure of damage, namely, AP's cost of furnishing the S wire alone to Times-Star.* Batzer, on cross-examination, conceded that this was so (R. 125b, 127b-128b, 139b-140b).** Indeed, in his basic report Batzer con-

*Batzer's basic report (D. Ex. 54, R. 525a-534a, 337a), as supplemented (D. Ex. 55, R. 541a-542a, 337a), goes through a tortured process of allocating total costs to costs attributable to the basic service, and allocating these costs between costs of gathering news and costs of distributing news, before he applies his lineage percentages. This does not disguise the fact that essentially all Batzer is doing is applying the lineage percentages to Times-Star's weekly assessment based on population. Thus, 56.14% of all lines of copy, attributed by Batzer to the A wire, multiplied by Times-Star's weekly assessment for the A, D and S wires, $1,317.45, equals $739.62. 14.60% for the D wire times $1,317.45, is $192.35. 29.26% for the S wire times $1,317.45 is $385.48. Compare these with Batzer's final figures: A wire—$756.38; D wire—$187.23; S wire—$373.84 (D. Ex. 55, R. 542a, 337a). In other words, Batzer could have arrived at the same irrelevant result without considering AP's costs at all.

**When Mr. Batzer was specifically asked whether his final figure for the S wire was "the cost of providing that news" alone to Times-Star, he replied, "In answer to your question, sir, you have posed a different set of facts. You have posed only one wire would be furnished. I don't know what other attendant circumstances there were. I cannot say, this would be the cost under the circumstances which you described" (R. 125b).

fessed that ". . . we feel that neither the charges or so-called elements themselves which make up the basic assessment nor any particular analysis thereof can be used to determine the separate wire cost" (D. Ex. 54, R. 526a-527a, 337a). This was confirmed at the trial by Times-Star's counsel, who stated "The [Batzer] report is essentially . . . an attempt to allocate the assessment. . . . It is not an attempt to show the cost going into the formula . . ." (R. 140b).

That Times-Star's assessment bears no relation to AP's cost of furnishing the basic three-wire service to Times-Star is dramatically disclosed by certain schedules to one of Batzer's reports (D. Ex. 35, R. 483a-485a, 324a). Schedule II (D. Ex. 35, R. 483a) may be taken as an example. Schedule II shows the allocation of the so-called First General Charge, one of the elements of AP's assessment formula, among various Ohio cities. The population of the Cincinnati area based on the 1950 census, with adjustments not material here, is listed at 863,000. Based on this population Cincinnati newspapers in the evening field were assessed, under the First General Charge, the weekly sum of $365.10.*

In contrast, evening field newspaper members in Cleveland were assessed $556.30 under the First General Charge, almost $200.00 more than Cincinnati, because Cleveland's population was 1,315,000, considerably more than Cincinnati's. Yet, Cleveland newspapers received the identical basic service supplied to Cincinnati newspapers (R. 156a-157a), and AP's cost, whatever it might be, of furnishing

*If there had been more than one Cincinnati AP member newspaper in the evening field, they would have shared in paying this assessment. Since Times-Star at the time was the only Cincinnati AP member in the evening field, it was assessed the entire sum (D. Ex. 35, R. 471a-472a, 324a). This fact alone shows that the amount of assessment paid by an individual newspaper has no relation to costs.

the basic service to Cleveland newspapers obviously must be about the same as its cost of furnishing the same service to Cincinnati newspapers.

An additional illustration demonstrating that Times-Star's assessment bears no relation to the cost of furnishing the service is the fact that a newspaper in a city and state west of Kansas City, having a population equal to Cincinnati, Ohio, would pay the same assessment as Times-Star, even though the D wire does not run west of Kansas City (R. 89b-90b).

Plainly, therefore, Batzer is not ascertaining AP's costs of supplying Times-Star when, for example, he suggests that since 41.83% of AP's total costs allocable to the basic service relate to distribution costs (as distinguished from gathering costs), 41.83% of Times-Star's weekly assessment of $1,317.45 is attributable to the cost of distributing the basic service to Times-Star (D. Ex. 54, R. 530a, 337a; D. Ex. 55, R. 542a, 337a). Nor is Batzer ascertaining costs when, for example, he suggests that since 29.26% of the copy transmitted to Times-Star over the three-wire basic service was sent over the S wire, therefore, 29.26% of AP's cost of distribution to Times-Star is attributable to the S wire (R. 532a, 542a).* One cannot, by applying a percentage to oranges, obtain lemons. Nor can one, by applying a percentage to an assessment based on population, obtain costs.

Since Times-Star, concededly, has not presented any relevant data as to AP's cost of supplying the S wire alone to Times-Star, there is no guide for determining or even estimating the difference between such cost and the assessments paid by Times-Star during the relevant damage

*The portions of Batzer's report dealing with news gathering costs are subject to the same infirmity as those dealing with news distribution costs (D. Ex. 54, R. 530a, 532a-534a, 337a; D. Ex. 55, R. 542a, 337a).

period. The Court of Appeals, therefore, correctly held that the counterclaim was properly dismissed because the evidence of damages was too speculative (Appendix A to Petition in No. 185, p. 32a, 53a). Its decision in this respect is perfectly consistent with prior decisions of this Court and of other Courts of Appeals, including the cases relied on by Times-Star.

Moreover, for all that appears in the record, AP's cost of furnishing the S wire alone to Times-Star could well have equalled or exceeded the entire assessment paid by Times-Star. Since Times-Star, which has the burden of proof, has concededly shown nothing concerning the cost of the S wire (R. 125b, 127b-128b), it has not demonstrated anything to the contrary, and there is a failure to prove the fact of damage or injury. For this reason we submit that the finding of the majority of the Court of Appeals that the granting of Times-Star's request in September 1957 for the S service only "would have effected a substantial reduction in appellant's [Times-Star's] operating costs" is erroneous and unsupported by anything in the record if, by the finding, the majority meant to imply anything more than the obvious conclusion that if AP agreed to supply only the S wire at a reduction in assessment a saving to Times-Star would have resulted (Appendix A to Petition, No. 185, pp. 6a-7a; R. 108a-109a). We doubt that it did.

Batzer's failure to arrive at anything remotely resembling AP's costs of furnishing the respective wires to Times-Star is, of itself, sufficient to sustain the dismissal of Times-Star's counterclaim. Apart from this basic defect, moreover, it should be noted that Mr. Batzer is an accountant who is not, and was not qualified as, an expert in the field of news gathering and distribution. No one testified that Mr. Batzer's calculations constituted a reasonable

method of apportioning AP's costs among the three wires supplied to Times-Star, or even that they were a reasonable method of apportioning Times-Star's assessment. Batzer himself, on cross-examination, would only go so far as to say that he "would hope" that his study might be useful in determining costs (R. 123b-124b).

Another infirmity in the Batzer study is the artificiality of percentages based on the number of lines of copy coming to Times-Star over each of the three wires constituting the basic service. To arrive at the percentages, Batzer counted the number of lines of copy transmitted over each of the wires on seven days picked at random in 1959 and 1960 (D. Ex. 54, R. 531a-532a, 540a, 337a).* No one, other than Mr. Batzer himself, who was not an expert, testified that total costs could reasonably be segregated among the three wires on any such basis (see R. 531a).

Common experience indicates that the cost of a particular news story cannot be ascertained by counting the lines. A ten line story, for example, may be the culmination of hours if not days of reportorial and editorial endeavor. A fifty line story, on the other hand, may be the result of only a few minutes work. Counting lines of copy, moreover, cannot reflect the days spent by newsmen on stories which never reach the wires.

Without evidence from one experienced in the trade that lineage bears any relation to cost, Mr. Batzer's percentages are valueless.

AP, in its Petition in No. 183, quoted an illuminating passage from Judge O'Sullivan's dissenting opinion on the subject of the inseparable character of news. The same passage bears repeating here, because it illustrates the in-

*Dates in 1959 and 1960 were selected because copy during the damage period (September 1957-July 1958) was not available (D. Ex. 54, R. 532a, 337a).

adequacy of Times-Star's proof of damages (Appendix to Petition, No. 185, pp. 35a-36a):

> "AP's man in Cairo gets information that a prominent Cincinnatian is killed in Cairo, Egypt, together with other Cairo news of worldwide interest; he sends this bundle of news to the AP bureau in New York, and from there it goes to the AP bureau at Columbus on the B wire; the chief there picks off the item of the death of the Cincinnatian and sends it to Cincinnati on the Ohio wire. I pose the question, when does this news become a separate and distinct commodity? At Cairo, Egypt? Or was it converted to singularity at Columbus? If so, should a charge for the service be limited to some portion of the salary of the AP man at Columbus and the cost of the electronic channel between Columbus and Cincinnati? But who then is to pay for the services of the people who gathered and sent out the news from Cairo, and who is to pay for its handling in New York and how will these costs be apportioned? How will Cincinnati be separately assessed for a part of Cairo's costs for the rare day on which an event in Egypt has some special interest in Cincinnati?"

I

The Question Presented Is of No General Importance in the Enforcement of the Antitrust Laws.

Petitioner suggests that an authoritative ruling by this Court is needed to establish the standards to be applied in measuring the extent of damages in tie-in cases (Petition, No. 185, pp. 7-9).

In the first place, this question need not be reached because Times-Star has failed even to prove the fact of damage, or injury. There is absolutely nothing in the record, as we have said, to show that AP's cost of furnishing the S wire alone to Times-Star does not equal or exceed Times-Star's entire assessment. The standard in these circumstances is clear. The fact of injury must be proven with certainty. *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 562.

The standard to be applied in antitrust cases for measuring the extent of damages is also settled and requires no further clarification by this Court. As Chief Justice Stone said in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 264:

> "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act upon probable and inferential, as well as direct and positive proof.'"

Times-Star's problem is one personal to itself. It failed to remove the damage issue from the area of pure speculation. In this case, where the facts relating to damages are unique, it would be of no aid to the administration of the antitrust law, even with respect to tie-in cases, for this Court to examine the testimony and exhibits merely to satisfy itself that the Court of Appeals' finding on the damage issue found support in the record.

Times-Star's assertion (Petition, No. 185, p. 8) that tie-in practices by their nature make difficult any certain determination of the extent of damage is belied by the very cases on which it relies: *Lessig* v. *Tidewater Oil Company*, 9 Cir., 327 F.2d 459, 471-2 (1964), *cert. den.*, 377 U. S. 993; *Osborn* v. *Sinclair Refining Company*, 4 Cir., 324 F. 2d 566, 570 (1963); *Bascom Launder Corp.* v. *Telecoin Corp.*, 2 Cir., 204 F.2d 331, 334 (1953), *cert. den.*, 345 U. S. 994. In these cases, which are far more typical of the usual tie-in problem than the instant case, the courts found no difficulty in finding a method for measuring the extent of the damage. If Times-Star encounters greater difficulty here, may we suggest that fundamentally it is because Times-Star is trying to segregate costs or assessments among elements of a serviee which is by nature inseparable.

Petitioner from time to time suggests that its difficulty in ascertaining the extent of its alleged damage is caused by AP's own wrong (Petition, No. 185, pp. 5, 8). But, as was said in *Bigelow*, ". . . even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork" (327 U. S. at p. 264).

Moreover, AP's "wrong" complained of is not the typical one found in tie-in cases. Usually, a defendant by compelling a plaintiff to purchase an unwanted product has prevented plaintiff from buying a desired product which he might have acquired at a lesser price. Here, for half a century the members of AP, of whom Times-Star was one, consented to a system of exchange of the AP news service, and a system of assessment on the basis of population, which rendered unnecessary, even if it were possible, any record keeping by AP which purported to show AP's cost of furnishing a single wire. If there was a wrong, which to us seems inconceivable, it was a wrong in which Times-Star participated.

Because of its unique and peculiar nature, this is not a case which is likely to create a precedent on the issue of damages in other cases. No policy reason exists for the granting of the petition in No. 185. See Hon. Fred. M. Vinson, *Work of the Federal Courts,* 69 Sup. Ct. v, vi (1948).

II

The Decision Below on the Damage Question Is Not in Conflict with the Decisions of This Court and of Other Courts of Appeals.

Much that we have previously said demonstrates that the decision below on petitioner's damages is perfectly consistent with the cases relied upon by petitioner (Petition, No. 185, pp. 9-12). The court below applied exactly the same standard of measuring damages as that enunciated by the cases on which petitioner relies.* That, in some instances, damages were awarded, proves nothing more than that the facts were different and that the plaintiffs succeeded in proving relevant data sufficient to remove the issue from the guesswork stage.

With as much warrant as Times-Star, AP can cite cases where the courts, again applying the same standard, found that proof of the amount of damages was too speculative. *E.g., Siegfried* v. *Kansas City Star Company,* 8 Cir., 298 F. 2d 1, 7-8 (1962), *cert. den.,* 369 U. S. 819, *affirming,*

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*Petitioner cannot properly rely on *Darden* v. *Besser,* 6 Cir., 257 F. 2d 285 (1958) (Petition, No. 185, p. 10), for the additional reason that "'contrary decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict. . . .'" Hon. John M. Harlan, *Manning the Dikes,* 13 The Record of the Association of the Bar of the City of New York (Dec., 1958), pp. 541, 552.

W. D. Mo., 193 F. Supp. 427, 434-5 (1961); *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 2 Cir., 297 F. 2d 906, 909-13 (1962), *cert. den.*, 369 U. S. 865; *Riss & Company* v. *Association of American Railroads*, D. D. C., 190 F. Supp. 10, 14-18 (1960), *aff'd*, C. A. D. C., 299 F. 2d 133, 136 (1962), *cert. den.*, 370 U. S. 916; *Emich Motors Corp.* v. *General Motors Corp.*, 7 Cir., 181 F. 2d 70, 83-4 (1950), *modified on other grounds*, 340 U. S. 558. All that either side establishes is that each case turns on its own particular, and differing, facts.

Closer on its facts to the instant case than any case cited by Times-Star is *Siegfried* v. *Kansas City Star Company*, *supra*. There, one element which contributed in rendering plaintiff's proof of the quantum of lost profits speculative was the fact that plaintiff maintained a single set of books in which was recorded the combined income and disbursements of the three or four businesses which he operated. Attempted allocations were found by the court to be no more than a "guess estimate" (193 F. Supp. at p. 435).

We do not urge that *Siegfried* is controlling here on the merits, any more than that the cases on which Times-Star relies are controlling. All that we assert is that where, as here and in *Siegfried*, proper standards are applied, and the ruling on damages turns on the peculiar facts of the case, the petition for certiorari should, as in *Siegfried*, be denied.

Times-Star has not established, as a ground for granting its petition, a conflict with any decision of this Court or of another Court of Appeals.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari in No. 185 should be denied.

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